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IN THE

Supreme Court of the United States

October Term, 1960

No. 127

JOHN JOSEPH KILLIAN,

—v.—

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

1. This Court's decision in *Travis* v. *United States* (No. 10, October Term, 1960) rested solely upon the finding that the indictment improperly laid the crime charged in the wrong venue. The decision thus leaves unresolved a number of important questions which the Court had brought before itself for resolution by its grant of a writ of certiorari, and which are likewise presented by the petition for a writ of certiorari in this case. These questions include,

> a. Whether the perjury rule of evidence is applicable to a prosecution for filing false affidavits under Section 9(h) of the Taft-Hartley Act.* (*Travis* petition, Question 1(a); *Killian* petition, Question 1(b).)
>
> b. Whether the requirement for conviction under Title 18 U. S. C. Section 1001 that the allegedly false

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* This Court also granted a writ of certiorari to review this question in *Gold* v. *United States*, 352 U. S. 819.

statement be material is satisfied, when petitioner's union did not make use of the machinery of the National Labor Relations Board while petitioner was an officer of the union. (*Travis* petition, Question 1(c). *Killian* petition; Question 1(d).)

c. Whether almost identical instructions to the jury defining membership in and affiliation to the Communist Party were erroneous and prejudicial. (*Travis* petition, Questions 2(a) and 2(b); *Killian* petition, Question 3.)**

2. The importance of these questions, the conflicts in the lower courts, and the conflicts with decisions of this Court with regard to these questions has been fully presented in the *Travis* and *Killian* petitions for writs of certiorari and will not be reargued here. We urge that the same considerations which warranted the grant of the writ in *Travis* are present in *Killian*, that the *Killian* presents squarely for resolution the same questions which this Court felt it worthwhile to resolve in *Travis*, and that this case is an appropriate vehicle for the resolution of those questions. Moreover, other important questions are presented to the Court by the petition here, including (among others), the refusal of the trial court to order production of documents, required to be produced under Title 18 U. S. C. Section 3500, cf. *Campbell* v. *United States*, 362 U. S. 909.

4. The *Travis* ruling, fixing venue at the district of filing emphasizes the government's failure to prove venue in this case. We do not conceive that an affidavit is only "filled" when it comes to its final resting place within a government agency. Delivery to the agency is sufficient. In this case, the government failed to meet its burden of proof that the affidavit was filed in the Northern District

** The instructions in *Killian* also conflict with the opinion of this Court in *Bridges* v. *Wixon*, 326 U. S. 135.

of Illinois, but simply proved that the affidavit came to rest in the files of the N. L. R. B. Chicago office. It may have been that the affidavit was delivered to a Board agent in Milwaukee. (In that case venue would lie in Wisconsin.) It may have been that the affidavit was mailed to Board in Washington and transmitted by them to Chicago. (In that case venue would be in Washington).

The burden did not lie upon defendant to disprove the allegations of the indictment. The burden lay upon the prosecution to prove the facts of filing which gave constitutional jurisdiction to try the proceedings in the Northern District of Illinois. It failed to meet this burden. In *United States* v. *Valenti* (C. A. 3 Cir.), 207 F. 2d 242, 244-245, similar proof was held insufficient to prove where the affidavit was filed.

CONCLUSION

For the reasons set forth in the petition, the reply, and this brief, the petition should be granted.

Respectfully submitted,

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